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No. 09-

IN THE

Supreme Court of the United States

KENZI NORIS ELIZABETH SNIDER,
Petitioner,

v.

SEUNG LEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a plaintiff can use an acquittal by a foreign tribunal to satisfy the favorable termination requirement in a *Bivens* malicious prosecution claim against an FBI Agent who coerced her confession in the United States, where that confession resulted in her extradition to the foreign country.

II. Whether a Fourth Amendment malicious prosecution claim is a cognizable *Bivens* action when a federal Agent coerces a defendant to falsely confess and uses that false confession to obtain an order for extradition.

PARTIES TO THE PROCEEDING

The Petitioner is Kenzi Noris Elizabeth Snider. Respondent is Sueng Lee, Federal Bureau of Investigation Agent.

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The opinion of the Fourth Circuit is reported at 584 F.3d 193. The district court's opinion is reported at 2008 U.S. Dist. LEXIS 19212.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause. . . .

18 U.S.C. § 3184:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for

> under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and considered.
>
> * * * *
>
> If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

STATEMENT OF THE CASE

I. FACTUAL ALLEGATIONS

On March 18, 2001, several exchange students, including Miss Snider and Miss Penich, went to a bar in Itaewon, South Korea, where they met and socialized with a group of United States Army soldiers. Miss Snider and Miss Penich were the last among the group to leave the bar. Pet. App. 42a. By the time Miss Snider and Miss Penich left the bar, Miss Penich was intoxicated and required assistance returning to the hotel. *Id.* at 43a. Miss Snider helped Miss Penich to her room and then went to her own room to sleep. The next morning, on March 19, 2001, Miss Penich was found dead. She had been

stomped to death. *Id.* at 41a-42a. About a year later, despite a complete lack of physical evidence tying Miss Snider to Miss Penich's murder, Miss Snider was arrested for Miss Penich's murder and extradited to South Korea. After spending nearly ten months in United States' jail and six months in South Korean prison, Miss Snider was exonerated by the Seoul District Court, but then forced to remain in Korea for another eighteen months while awaiting appellate review of her case. *Id.* at 51a-52a.

Because of the violent nature of Miss Penich's death, the crime scene was very bloody. Despite the bloody scene, no blood or physical evidence was ever found on Miss Snider's clothing, in her room, or in the hallway leading to her hotel room. Pet. App. 71a. Additionally, following the murder, several witnesses reported seeing a man loitering in the hallway outside of Miss Penich's room, hearing a struggle coming from Miss Penich's room, and seeing a man leave the hotel with blood on his pants. *Id.* at 105a-107a.

Miss Snider, the soldiers, and the five other students traveling with Miss Penich were questioned during the initial investigation, but the Korean police made no arrests. Pet. App. 43a-44a. Given the absence of any evidence linking Miss Snider to the crime and the presence of evidence indicating a male perpetrator, the Korean police had no reason to suspect that Miss Snider murdered Miss Penich. *Id.* at 71a. Because the Korean authorities were unable to make any arrests, the FBI and the Korean government suffered intense political scrutiny for their failure to solve the crime. *Id.* at 73a-74a; *id.* at 107a-108a. The Korean investigation continued over the next several months, but with no demonstrable leads and no arrests. While Korean investigators

were struggling, FBI Agents Mark Mansfield and Seung Lee traveled to South Korea to assist the Korean authorities. *Id.* at 46a. Although Mansfield was part of the initial murder investigation in South Korea, Lee was new to the case. *Id.* at 45a-46a. Neither Lee nor Mansfield had ever investigated a homicide before. *Id.* After conducting some investigatory work in South Korea, the Agents returned to the United States. Nearly a year after Miss Penich's murder, in February 2002, Mansfield and Lee contacted Miss Snider and requested that she meet them at a Ramada Hotel in Huntington, West Virginia. *Id.* at 48a.

Prior to Miss Snider's interrogation, while looking through reports and statements, Mansfield noticed a large boot print on the back of a copy of Miss Snider's original statements to Korean police during the week of the murder. Pet. App. 46a. Hoping that the print was related to the content on the other side of the statements, thereby incriminating Miss Snider, Mansfield and Lee asked the Korean detectives who prepared the papers to explain the presence of the footprint. *Id.* at 46a. The detectives explained that the paper that the statement was written on had been used during boot print testing and then later reused to copy Miss Snider's statement. *Id.* Thus, the presence of the print on the statement was mere coincidence. Despite having no evidence implicating Miss Snider and because of the intense political pressure to solve the crime, Mansfield and Lee focused their investigation on Miss Snider and made plans to interrogate her. *Id.* at 73a-74a; *id.* at 107a-108a. In advance of their meeting with her, the Agents developed a "lesbian theory" of the crime, in which Miss Snider supposedly killed Miss Penich in a jealous, romantic rage. *Id.* at 95a-96a.

Based on their self-proclaimed "lesbian theory" and notwithstanding FBI Behavior Analyst Mark Safarik's suggestion that the killer was likely male, eyewitness accounts that likewise suggested a male perpetrator, and the complete lack of any physical evidence linking Miss Snider to the crime, Mansfield and Lee interrogated Miss Snider over the course of three days in February 2002. Pet. App. 47a.

On the first day of the interrogation, February 4, 2002, the Agents focused on building a rapport with Miss Snider; they led her to believe that the purpose of their meeting with her was so that she could help them solve her friend's murder. Pet. App. 78a; *id.* at 49a. Mansfield later described this as a friendly, "getting-to-know-you" session. *Id.* at 92a. Miss Snider was susceptible to such rapport-building tactics because she already knew Mansfield from the initial Korean investigation. *Id.* at 76a; *id.* at 92a. None of the sessions were audio or videotaped because the Agents were trained not to record interrogations. *Id.* at 100a-101a. Similarly, no log or notes were kept. *Id.* at 111a. Miss Snider brought a friend with her to the hotel; however, the Agents would not allow her to bring her friend into the interrogation room and took Miss Snider to another floor of the hotel, alone. *Id.* at 77a. Although the interrogation took place in Lee's hotel room, the Agents did permit Miss Snider to leave the room briefly to speak with her friend. *Id.*

At the end of the first day of the interrogation, the Agents asked Miss Snider to complete a "homework assignment," by writing down what she remembered of the events from the night of the murder. Pet. App. 49a. Miss Snider completed the assignment, and the statement indicated her innocence. *Id.*

On the second day of the interrogation, Miss Snider brought her "homework assignment" to the Agents, along with ice cream to share. Pet. App. 78a-79a. A few hours into this second questioning session, the Agents shifted tactics. Divittis moved to the bed where Miss Snider was sitting, and the Agents told Miss Snider that her account of the night of the murder was inconsistent. *Id.* at 80a.

When the interrogation became hostile, Miss Snider asked the Agents if she needed a lawyer. She stepped outside the room for about ten seconds and then reentered. Pet. App. 80a-81a. The Agents replied that a lawyer would make things harder on her because they would be unable to say that she cooperated with the investigation. *Id.* at 120a-121a. They recommended that she cooperate without a lawyer present. *Id.* Wishing to demonstrate her innocence and believing that contacting a lawyer would compromise her ability to do so, Miss Snider relented. *Id.* At that time, Lee and Mansfield placed themselves between Miss Snider and the door, blocking her ability to exit the room. *Id.* at 85a.

Next, the Agents discussed the phenomenon of "repression" with Miss Snider. Pet. App. 96a-98a. They also provided her with disturbing information and photos of the crime scene and asked her leading questions to help her "recall" repressed memories. *Id.* at 49a-50a. They hypothesized that there was a lesbian encounter between Miss Snider and Miss Penich that triggered the attack, though there was no evidence that either woman had any homosexual tendencies. *Id.* at 88a-89a. Though Miss Snider became visibly upset by the interrogation and maintained her innocence, the Agents yelled at her, called her a liar, and insisted that her inability to recall the murder was attributable to "repression."

Id. at 49a-50a. The Agents further misrepresented the potential penal consequences under Korean law, which included the death penalty: they told Snider that extradition to South Korea would be difficult and that the charged suspect would be treated leniently. *Id.* at 91a-92a; *id.* at 110a.

With the agent-fueled misrepresentation of the consequences of a confession, and after five hours of interrogation in which Miss Snider was no longer able to discern her true memories from those suggested to her by the Agents, she finally acquiesced and accepted the version of the murder proffered by the Agents. Pet. App. 92a-94a; *id.* at 50a. At no time during the interrogation was Miss Snider read her Miranda rights. *Id.* at 72a-73a.

After Miss Snider accepted the Agents' view of events, the Agents asked her to return for a third day of interrogation. Pet. App. 85a. After a sleepless night, Miss Snider returned and the Agents told her that they would like to get her confession in writing. *Id.*; *id.* at 121a. Mansfield handwrote the confession, which Miss Snider signed. *Id.* at 86a.

After Miss Snider's interrogation, an investigation was undertaken to find physical evidence linking Miss Snider to the murder. Miss Snider's DNA was not found on the body or at the crime scene. Pet. App. 83a-85a; *id.* at 87a. No blood stains were found on the clothing that Miss Snider wore on the night of the murder, even though she was wearing the same pants the night of the murder and the morning after the murder when Miss Penich's body was discovered. *Id.* at 99a-100a; *id.* at 122a-123a. While physical evidence implicating Miss Snider was never found, the investigation revealed semen in Miss Penich's underwear and Type B blood, the same as Miss Penich's, near the South Korean hotel's exit, even

though there was no evidence that Miss Snider left the hotel that night or was otherwise near the exit. *Id.* at 103a; *id.* at 71a. In addition, a blood Type A hair was found under Miss Penich's head, which did not match Miss Snider, Miss Penich, or Miss Penich's roommate. *Id.* at 104a.

On February 28, 2002, extradition proceedings were initiated before the United States District Court for the Southern District of West Virginia. Pet. App. 51a. Miss Snider was extradited on December 20, 2002. *Id.* Other than the confession, no evidence was developed or introduced tying Miss Snider to the murder. *Id.* at. 39a. In fact, during the hearing, expert witness Richard Ofshe testified that the prepared statement that Miss Snider signed was "deeply troubling," that it had "elements . . . that suggest strongly that it could be a false confession," and that there was a "lack of independent corroboration of [Miss Snider] having perpetrated the crime." *Id.* at 129a.

Miss Snider was acquitted by the Seoul District Court on June 19, 2003, and her acquittal was upheld both by the appeals court and by the Korean Supreme Court. Pet. App. 39a-40a.

II. PROCEEDINGS AND DECISIONS BELOW

On May 24, 2007, Miss Snider filed a complaint against Agents Divittis, Mansfield, and Lee in the United States District Court for the Southern District of West Virginia. Pet. App. 38a. In the complaint, Miss Snider alleged that the false confession elicited from her by the Agents resulted in her extradition to South Korea and her imprisonment for more than

fifteen months for a crime that she did not commit. *Id.* at 40a.[1]

Miss Snider stated five claims against the Agents: (1) a Fifth Amendment claim of coerced confession; (2) a Fifth Amendment claim for deprivation of the right to a fair trial, wrongful extradition, and wrongful imprisonment; (3) a Fifth Amendment claim for failure to intervene; (4) a Fourth Amendment claim for false imprisonment; and (5) a Sixth Amendment claim for denial of counsel. Pet. App. 41a-42a.

On March 10, 2008, the District Court dismissed all of the above claims on statute of limitations grounds, except for the Fifth Amendment claim for deprivation of the right to a fair trial, wrongful extradition, and wrongful imprisonment. Pet. App. 28a-47a.

Agent Lee filed a Motion to Dismiss, or in the alternative, for Summary Judgment on grounds of qualified immunity. The District Court denied the motion, reasoning that:

> Taking Plaintiff's version of the facts as true for this inquiry, there were psychological influences from the officers that resulted in her coerced confession; Plaintiff was entitled, but not permitted, to consult with an attorney; and the officers failed to intervene to protect her. These facts, if true, establish that Defendant Lee violated at least one constitutional right.

Pet. App. 36a-37a. The court further held that "officers are not entitled to coerce a confession, that

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[1] Defendants Divittis and Mansfield are not parties to this action because they were not served until very recently and were not part of the District Court or Fourth Circuit proceedings.

individuals in custodial interrogations are entitled to counsel, and that officers have a duty to intervene to protect certain individuals in circumstances where they may be harmed by another officer." *Id.* at. 37a. According to the court, Lee clearly "played a role in the initiation of the criminal proceedings" against Miss Snider, and Miss Snider "establishe[d] a basis for her claims" so that summary judgment was precluded. *Id.* at 46a.

The District Court found that, viewing the facts in the light most favorable to the Miss Snider, there were genuine issues of material fact as to whether Agent Lee violated Miss Snider's clearly established constitutional rights. Therefore, Agent Lee was not entitled to qualified immunity. Pet. App. 38a.

On October 6, 2009, the Fourth Circuit found that Lee was entitled to summary judgment on the basis of qualified immunity because Miss Snider failed to show a well-established constitutional violation. Without deciding if the Constitution guarantees a right to be free from malicious prosecution, the Court held that even if a malicious prosecution cause of action exists, Miss Snider failed to make out a valid claim because she failed to show that she met one element of the cause of action: "favorable termination of the criminal proceeding flowing from the seizure." Pet. App. 12a. The Court rejected Miss Snider's argument that her acquittal by the South Korean Supreme Court served as the favorable termination of the criminal proceeding flowing from her seizure in the United States. The court instead found that:

> [T]he extradition hearing did *not* terminate in Snider's favor [and] [i]t is the extradition proceeding to which we must look for determining whether Snider was successful for purposes of a malicious prosecution claim under

> the Fourth Amendment because her seizure was effected only for the purpose of conducting the extradition hearing.

Pet. App. 16a (emphasis in original).

Concurring in judgment only, Judge Stamp accepted Miss Snider's argument that her acquittal in South Korea constituted favorable termination of the criminal proceeding against her. Judge Stamp noted that viewing Miss Snider's arrest as solely for the purpose of the extradition hearing was "an overly narrow characterization of the reasons underlying Snider's seizure" and that "the extradition hearing was merely a means of prosecuting the broader criminal action against Snider." Pet. App. 20a (Stamp, J., concurring).

SUMMARY OF THE ARGUMENT

The Fourth Circuit erred by holding that the extradition order constituted a "final judgment" that terminated the criminal proceeding against Miss Snider. Pet. App. 16a. Although a foreign tribunal acquitted Miss Snider of all charges, the Fourth Circuit nevertheless held that she could not satisfy the "favorable termination" requirement of a *Bivens* malicious prosecution claim. These holdings diverge from Second, Third, Seventh, Ninth and Eleventh Circuit precedent regarding the character and scope of extradition proceedings. Furthermore, the Fourth Circuit's decision misunderstands the nature of extradition hearings. An extradition order merely constitutes a finding of probable cause and does not

terminate the criminal proceeding.[2] The Fourth Circuit's holdings also disregard the fundamental purpose of the favorable termination requirement of a malicious prosecution claim: to prevent people from challenging guilty verdicts through malicious prosecution civil suits. *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). Because Miss Snider was acquitted, she is not challenging a guilty verdict through a malicious prosecution claim. Therefore, the extradition order should not prevent her from seeking redress for violations of her constitutional rights. Under the Fourth Circuit's logic, government Agents may coerce confessions from American citizens without fear of malicious prosecution as long as those citizens are tried outside the United States.

This case also provides this Court with the opportunity to clarify the scope of a federal malicious prosecution cause of action. In *Wallace* v. *Kato*, this Court declined to take a position on the validity of malicious prosecution claims under § 1983. 549 U.S. 384, 390 n.2 (2007). As a result, the law of malicious prosecution varies drastically by circuit, with half the circuits recognizing a federal malicious prosecution cause of action. Although federal law provides causes of action for constitutional violations similar to malicious prosecution, none of these claims provides remedy for the entire length of detention or incarceration. A federal malicious prosecution cause of action is thus necessary to supplement these remedies. See *Heck*, 512 U.S. at 484 (stating that malicious prosecution "permits damages for confinement imposed pursuant to legal process").

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[2] An order denying extradition would clearly be a favorable termination since it would end the criminal proceedings and establish that not even probable cause exists.

The Court should use this opportunity to clarify the requisite elements of a federal malicious prosecution claim. Because the prevalence of extradition hearings will continue to affect a large number of citizens, this Court should find that extradition orders do not constitute an unfavorable termination in a malicious prosecution claim.

ARGUMENT

I. THE FOURTH CIRCUIT'S HOLDING THAT THAT AN ORDER OF EXTRADITION QUALIFIES AS A FINAL JUDGMENT THAT ACTS AS A TERMINATION OF CRIMINAL PROCEEDINGS IS IN CONTRAVENTION OF THIS COURT'S LOGIC IN *HECK* V. *HUMPHREY*, AND AT LEAST FIVE OTHER CIRCUITS.

The Fourth Circuit's decision diverges from Second, Third, Seventh, Ninth, and Eleventh Circuit precedent regarding the character and scope of extradition proceedings. The Fourth Circuit held that a defendant acquitted by a foreign tribunal is barred from bringing a malicious prosecution claim because an order of extradition is a "final judgment" constituting an unfavorable termination of criminal proceeding. This holding misstates the purpose of an extradition order, which does not terminate the criminal proceeding. Review by this Court is warranted to correct the circuit split created by the Fourth Circuit's decision.

Malicious prosecution generally requires a plaintiff to show four elements: "(1) the defendant initiated of maintained a criminal proceeding; (2) the criminal proceeding terminated in plaintiff's favor; (3) the proceeding was not supported by probable cause; and

(4) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." Pet. App. 17a (Stamp, J., concurring). The favorable-termination requirement of the underlying criminal proceeding is the threshold issue for a malicious prosecution claim. *Janetka* v. *Dabe*, 892 F.2d 187, 189 (2d Cir. 1989). This requirement prevents plaintiffs from challenging a guilty verdict through a civil suit. *Heck*, 512 U.S. at 485. The relevant inquiry for this element of a malicious prosecution claim is the termination of the entire criminal proceeding. See *Kossler* v. *Crisanti*, 564 F.3d 181, 188 (3d Cir. 2009). Terminations are favorable where "their final disposition is such as to indicate the accused is not guilty." *Singleton* v. *City of New York*, 632 F.2d 185, 193 (2d Cir. 1980); see also Restatement (Second) of Torts § 660 cmt. a (1977). Terminations are unfavorable only where they tend to indicate guilt. See *Singleton*, 632 F.2d at 193; *Kossler*, 564 F.3d at 187.

Unlike a final judgment, an extradition order continues, rather than terminates, the criminal proceeding. The purpose of an extradition hearing is not to adjudicate the merits of the case, but rather to determine whether there is probable cause to prosecute. Despite the preliminary nature of such hearings, the Fourth Circuit held that an extradition order is a "final judgment." Pet. App. 16a. The Court further held that "because [Miss Snider's] seizure was effected only for the purposes of conducting the extradition hearing," the extradition proceeding was the relevant inquiry for purposes of a malicious prosecution claim. *Id.* In the extradition hearing, the magistrate judge found probable cause and ordered Miss Snider's extradition. The Fourth Circuit held that the extradition order constituted an unfavorable

"final judgment" that barred Miss Snider's malicious prosecution claim, despite her ultimate acquittal in South Korea. Although the Fourth Circuit correctly noted that final judgments are appropriate rulings for the favorable termination requirement, it departed from other circuits in holding that extradition orders constitute final judgments.

The Second, Third, Seventh, Ninth, and Eleventh Circuits have specifically stated that extradition orders do not constitute final judgments. *Jhirad* v. *Ferrandina*, 536 F.2d 478, 482 (2d Cir. 1976); *Matter of Assarsson*, 635 F.2d 1237, 1246-47 (7th Cir. 1980); *Hooker* v. *Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978); *Hoxha* v. *Levi*, 465 F.3d 554, 560 (3d Cir. 2006); *Noel* v. *United States*, 12 F. Supp. 2d 1300, 1302 (M.D. Fla. 1998), *aff'd* 180 F.3d 274 (11th Cir. 1999). As the Ninth Circuit has stated, an extradition hearing "signals the start, rather than the conclusion, of litigation of the fugitive's guilt or innocence. As opposed to a *final judgment*, it is truly an interlocutory order, more akin to a preliminary hearing on criminal charges." *Hooker*, 573 F.2d at 1367 (emphasis added). Furthermore, "it cannot be said that an order of extraditability constitutes a final judgment for purposes of res judicata," nor for purposes of *18 U.S.C. § 3184*. *Id.* at 1368; see also *Caplan* v. *Vokes*, 649 F.2d 1336, 1340 (9th Cir. 1981) ("Because a certification of extraditability is not a 'final order,' no direct appeal lies from that decision.").

Because the vast majority of circuits have recognized that extradition proceedings do not determine guilt or innocence, are *sui generis*, are not appealable, and do not use procedural safeguards present at trials, the Fourth Circuit erroneously concluded that the extradition hearing was the

"termination of the criminal proceeding" that defeated Miss Snider's claim for relief. Because extradition hearings do not determine the guilt or innocence of the accused, an extradition order is neither a final judgment nor a termination of the criminal proceedings. *Assarsson*, 635 F.2d at 1246; *Hooker*, 573 F.2d at 1367. The Seventh Circuit noted that an extradition order "does not constitute a *final judgment* on the guilt or innocence of the accused." *Assarsson*, 635 F.2d at 1246-47 (emphasis added). Instead, the purpose of extradition hearings is limited to determining "whether there is 'competent legal evidence which . . . would justify [the accused's] apprehension and commitment for trial if the crime had been committed in [the forum] state.'" *Hooker*, 573 F.2d at 1367 (quoting *Collins* v. *Loisel*, 259 U.S. 309, 315, (1922)). This Court has likewise acknowledged that an extradition hearing requires only a showing of probable cause. *Benson* v. *McMahon*, 127 U.S. 457, 462-63 (1888). See also *Collins* v. *Loisel*, 259 U.S. 309, 314-15 (1922); *Charlton* v. *Kelly*, 229 U.S. 447, 458 (1913); *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925).

However, the Fourth Circuit concluded that an extradition order to a foreign tribunal is an unfavorable termination of the criminal proceeding, even where the defendant is acquitted. In essence, the Fourth Circuit conflated extradition with a finding of guilt for purposes of a malicious prosecution claim, a conclusion that is inconsistent with the decisions of all the circuits to have addressed the issue.

Moreover, extradition hearings cannot terminate a criminal proceeding because they are not criminal in nature. The Second, Ninth, and Eleventh Circuits have found that extradition hearings are *sui generis*,

neither civil nor criminal. See *Jhirad*, 536 F.2d at 482; *United States* v. *Kirby*, 106 F.3d 855, 867 (9th Cir. 1996); *Martin* v. *Warden*, 993 F.2d 824, 828 (11th Cir. 1993). Instead, extradition proceedings are an executive function for which "the judiciary serves [as] an independent review." *Martin*, 993 F.2d at 828.

Additionally, extradition orders cannot serve as final judgments that terminate a criminal proceeding because they cannot be appealed. This Court has long recognized that extradition orders are not appealable. *Benson*, 127 U.S. at 462-63. Because any state, federal, or magistrate judge may issue extradition orders, such orders "do not . . . constitute 'final decisions of a district court'" and are not "appealable as of right under 28 U.S.C. § 1291." *Jhirad*, 536 F.2d at 482; see also *Sidali* v. *INS*, 107 F.3d 191, 195 (3d Cir. 1997) (same).

Moreover, because extradition hearings do not provide the procedural protections afforded at trial, they cannot render final judgments that terminate criminal proceedings. This Court has discussed the procedural differences between extradition hearings and trials. See *Charlton*, 229 U.S. at 462; *Bingham* v. *Bradley*, 241 U.S. 511, 517 (1916). Individuals subjected to extradition hearings are not entitled to cross examine witnesses. *Id.* Evidence generally inadmissible in a criminal proceeding can be introduced. *United States* v. *Lui Kin-Hong*, 110 F.3d 103, 119 (1st Cir. 1997). The magistrate also may exclude evidence of the accused's potential defenses. *Charlton*, 229 U.S. at 461-62. These procedural deficiencies reveal that extradition hearings do not allow courts to consider the merits of the case because the hearings are intended to serve as the first stage of the criminal proceeding.

Unlike decisions from other circuits, the Fourth Circuit's decision in *Snider* does not recognize the lack of procedural protections inherent in extradition hearings. As Judge Stamp' concurrence noted, "[the majority] does not seem . . . to acknowledge the circumscribed purpose of an extradition hearing and the limited ability of a defendant to challenge the evidence presented against him or her in such a proceeding." Pet. App. 21a. It was thus error for the Fourth Circuit to fail to recognize that the procedural deficiencies inherent in extradition hearings indicate that they do not constitute final judgments in criminal proceedings.

Despite the limited and unique nature of extradition proceedings, the Fourth Circuit deemed the extradition hearing a "trial" and held that an order of extradition is a final judgment. Pet. App. 16a. The Fourth Circuit reasoned that extradition orders constitute final judgments because, after the certification by the judicial officer and Secretary of State, the case is outside the jurisdiction of the United States judiciary. *Id.* Such a conclusion is inconsistent with the numerous cases holding that extradition hearings do not determine guilt or innocence; are *sui generis*; are not appealable; and do not afford the same procedural safeguards available at trial. Consequently, the Fourth Circuit erred in holding that an extradition order is a final judgment that unfavorably terminates the criminal proceeding.

Review by this Court is warranted to correct the circuit split and the Fourth Circuit's error. Without clarification from this Court, the constitutional rights of the many United States citizens subject to extradition hearings will remain unclear and circumscribed. Additionally, without guidance from this Court, an extradition order can serve as

immunity from malicious prosecution claims because extradited individuals can never satisfy the favorable termination requirement. The decision regarding whether extradition orders constitute final judgments also has broad implications, as it may also apply to rendition or interstate extradition.

Finally, the principle of comity of nations also counsels that courts recognize the validity of the judgment of a foreign tribunal in this context. See *Am. Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909) ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."). Thus, the Fourth Circuit erred when it failed to recognize the validity of Miss Snider's acquittal in South Korea for purposes of a malicious prosecution claim.

II. THIS COURT SHOULD FIND FOURTH AMENDMENT MALICIOUS PROSECUTION CLAIMS VALID.

A. This Court Has Not Decided the Validity or Scope of a Fourth Amendment Malicious Prosecution Claim.

This case demonstrates the need for the Supreme Court to recognize a malicious prosecution cause of action. In *Wallace* v. *Kato*, this Court declined to take a position on the validity of malicious prosecution claims under § 1983. 549 U.S. at 390 n.2. Consequently, although almost every circuit court has recognized some form of malicious prosecution, the elements necessary to prove the claim vary by

circuit. This case provides the Court with the opportunity to clarify the law regarding malicious prosecutions.

The *Wallace* decision did not reconcile the diversity of views left by the six opinion plurality of *Albright* v. *Oliver*, 510 U.S. 266 (1994). Although the Court has not opined on whether the Fourth Amendment provides a *Bivens* claim for malicious prosecution, the Court has said that the common law of torts "provide[s] the appropriate starting point for the inquiry under § 1983." *Heck*, 512 U.S. at 483 (citation omitted). Malicious prosecution has long been recognized by the common law. *Id.* The Court in *Heck* analogized the petitioner's claim to a claim for malicious prosecution because the petitioner, filing *pro se*, raised a § 1983 violation by a state investigator who allegedly destroyed exculpatory evidence. Since the alleged conduct was wrongfully instituted legal process, not a lack of legal process, the Court found malicious prosecution the best analogy. *Id.* at 484-85. Although the Court did not find that the petitioner had a successful claim for malicious prosecution because his conviction had not been overturned, it discussed whether the facts fit into the malicious prosecution framework. The Court held that a conviction must be reversed, expunged or declared invalid in order to bring a federal civil action for allegedly unconstitutional imprisonment—in essence, a favorable termination requirement. *Id.* at 489. Furthermore, this Court recognized the widespread acceptance of malicious prosecution claims in *Albright* v. *Oliver*. 510 U.S. 266, 271 (1994).

Although this Court has not yet recognized a Fourth Amendment malicious prosecution claim, many circuit courts have identified a Fourth Amendment malicious prosecution claim. See

Roberts v. *Babkiewicz*, 582 F.3d 418 (2d Cir. 2009); *McKenna* v. *City of Philadelphia*, 582 F.3d 447 (3d Cir. 2009); *Harris* v. *Bornhorst*, 513 F.3d 503 (6th Cir. 2008), *cert. denied*, 128 S. Ct. 2938 (2008); *Lassiter* v. *City of Bremerton*, 556 F.3d 1049 (9th Cir. 2009); *Wilkins* v. *DeReyes*, 528 F.3d 790 (10th Cir. 2008); *Kjellsen* v. *Mills*, 517 F.3d 1232 (11th Cir. 2008). However, the Fourth Circuit has not yet incorporated malicious prosecution into federal law.

B. A Federal Malicious Prosecution Claim Is Necessary to Protect People Who Are Injured Due to the Wrongful Initiation of Legal Process.

A federal Fourth Amendment malicious prosecution claim would apply to events such as rendition and state extradition and would enable citizens to assert their constitutional rights.

Federal law, through *Bivens*, provides causes of action for constitutional violations similar to malicious prosecution, such as false imprisonment and false arrest. Section 1983 and *Bivens* actions are specifically designed to provide a remedy when the acts of a public official violate a person's constitutional rights. *Baker* v. *McCollan*, 443 U.S. 137, 142 (1979). The proscriptions against malicious prosecution and false arrest result from the same policy interest in protecting people from unconstitutional conduct by state and federal agents. Because the Court already recognizes false arrest as a constitutional violation, the Court should likewise recognize malicious prosecution as a constitutional tort.

This Court has recognized that malicious prosecution, false arrest, and false imprisonment

implicate different but equally important constitutional rights:

> Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges. . . . Thereafter, unlawful detention forms part of the damages for the "entirely distinct" tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.

Wallace, 549 U.S. at 389-90 (emphasis in original; citations omitted). A malicious prosecution cause of action would provide remedy for constitutional violations for the duration of the legal process. Because false arrest and false imprisonment claims only require a showing that legal process was not followed, such claims can only provide damage awards for the time of detention before arraignment or issuance of process. Likewise, a claim for abuse of process is "limited to the harm caused by the misuse of process, and does not include harm . . . resulting from that process's being carried through to its lawful conclusion." *Heck*, 512 U.S. at 486 n.5. A malicious prosecution cause of action would provide remedy for the entire length of detention or incarceration. See *id.* at 484.

As Judge Posner in the Seventh Circuit has commented, "it is shocking to think that a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is." *Gauger* v. *Hendle*, 349 F.3d 354, 359 (7th Cir. 2003).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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